

20 IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 26th day of May, 1998

BEFORE

THE HON'BLE MR. JUSTICE V. P. MOHAN KUMAR

WRIT PETITION NO. 3531 OF 1996

BETWEEN :

M/s. Sha Hirachand Dungarchand & Co.,
Kirana Bazar,
Bijapur,
A registered partnership firm,
by Partner :
Sri Lalchand . H. Jain,
Son of Sri Hanjarimal,
aged 37 years

.. PETITIONER

(Sri B.P. Gandhi, Advocate)

A N D :

The Assistant Commissioner of
Commercial Taxes, (Cross Verification),
Enforcement - I,
North Zone,
Sadashivanagar,
Belgaum

.. RESPONDENT

(Smt. S. Sujatha H.C.G.P.)

Writ Petition filed under Article 226 & 227 of
the Constitution, praying to issue RULE NISI ; and

and to issue a writ, directing the respondent to refund a sum of Rs. 24,000/- being amount collected pursuant to Annexure -A in excess of limits prescribed under Section 23 (b) of KTEG Act, etc.

This Writ Petition having been heard and reserved for orders and coming on this day for pronouncement of orders, the Court pronounced the following :

O_R_D_E_R

This Writ Petition raises an interesting question. That is, whether the respondent exercising the power of composition conferred under the taxing law, can demand, collect and retain, sum in excess of the composition fee provided for composition of offences provided for under the taxing statute. The facts of the case, material for the adjudication of the dispute, is as hereunder.

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2. The petitioner a trader in sugar assessed to Sales Tax by the Assistant Commissioner of Commercial Taxes. The 1st respondent herein on 13.7.94, searched the premises of the petitioner and alleging that he has purchased sugar from ^{✓ & ✓} sugar factory at Ichalkaranji during the year 1992-93 directed the petitioner to pay a sum of Rs. 91, 053/- as entry tax. The petitioner alleges that

that there is no assessment made for the demand made as above. Besides, as per Annexure - A, the petitioner alleges that he was called upon to pay Rs. 25,000/- as composition fee under Section 23 of the Act.

He paid the same to avert prosecution and Annexure - B is the receipt evidencing that payment. The petitioner alleges that levy of compounding fee falls under Section 231 (b) and as such it cannot exceed Rs. 1000/-. The excess levy is hence illegal and is liable to be refunded.

3. The petitioner alleges that he filed an appeal against the order under Section 23 and by order Annexure - C dated 24.8.95, the appellate authority rejected the same as incompetent. Thereafter the above writ petition was filed by the petitioner challenging the excess levy of composition fee and seeking refund in excess of Rs. 1000/-.

4. The contention of the department, ~~to~~ as disclosed from Annexure - A is that, when it was

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was discovered at the search held on 31.7.94, that, the petitioner had effected 51 purchase transaction during the year 1992-93, involving Turnover of Rs. 45,51, 731/-, the levy of entry tax was attracted and as such on 17.8.94, a notice was issued to the petitioner providing herein an opportunity to discharge the entry tax liability as indicated. In response, partner of the petitioner firm appeared on 19.8.94 and after admitting the liability handed over the cheques to cover the tax liability willingly. He thereafter came forward to compound the offence departmentally. Later on 25.8.94, he appeared at the Bijapur Camp of the respondent and come forward to compound the offence by paying Rs. 25,000/- as the compounding fee. Considering the tax liability, the respondent accepted the offer. The payment of composition fee being voluntary the petitioner is not entitled for any refund.

5. I have heard Mr.B.P. Gandhi, learned Counsel for the petitioner as also Ms. Sujatha, learned Government Pleader at length.

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6. I will first deal with the question of delay, ^{in approaching this Court as} urged by the Government Pleader opposing the prayer. The

The composition ^{was} effected by the petitioner impugned herein was on 25-8-1994 and the Writ Petition was filed on 5-2-1996. There is thus delay in moving this Court. It is seen that the petitioner pursued an incompetent appeal which was disposed of on 24-8-1995. Reckoning from that date it cannot be said that there is inordinate delay in approaching this Court. Learned Government Pleader relies on the judgment in W.P.No.29546 of 1996 wherein, ^{it is} ~~she~~ urged that, in a similar circumstance this Court refused to exercise its jurisdiction under Article 226 of the Constitution. Therein, ⁱⁿ I find that, the said W.P., what was impugned was the order made on 18-7-1995 by filing a W.P. on 2-9-1996 i.e., nearly after more than one year. The explanation offered therein was only a contemplated appeal. That explanation this Court thought is insufficient to explain the bona fides of the petitioner. It was for that reason, ^{that} this Court refused to condone the delay.

7. But, the facts in this case are different. Here as a matter of fact the petitioner pursued an incompetent appellate remedy which was disposed of on

24-8-1995. As such it is demonstrated that there is a bona fide explanation for the delay in approaching this Court. The observation in W.P.No. 29546/96 will not therefore conclude the case. I am of the view that there is no inordinate delay on the part of the petitioner in moving this Court challenging the levy.


8. Now as regards the merits of the case is concerned, the claim of the petitioner has to be upheld. The statute make the commission on the part of the petitioner an offence punishable under Section 21 of the Act. The maximum punishment imposed under the said provision is levy of penalty which may extend upto Rs.250/-. Under Sub-Section(2) while he is liable to be convicted to imprisonment, if he is to suffer fine, it may ^{be} ~~be~~ not less than Rs.1000/- and not more than Rs.5,000/-. Now, assuming for argument sake, he is prosecuted in the Court of law, he may plead guilty of the offence and the penalty cannot extend upto Rs.25,000/-. Thus, by seeking to compound the offence he should not be placed in a worse position than had he been prosecuted. Perse therefore the levy of ~~express~~ composition fee is illegal.

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9. The next question to be considered is whether willingness on the part of the petitioner to pay a larger amount by way of a composition fee would alter the situation in any manner. This question has to be looked at in the following manner. The power being exercised by the Officer is under Section 31 of the Entry Tax Act. Outside the said provision, there is no power to compound the offence with respect to which the assessee could be proceeded against. And an assessee has to satisfy the conditions laid down in Section 31 to compound the offence. One such condition is that he be willing to pay a maximum composition fee of Rs.1000/-. The composition fee thus fixed is not a negotiable amount. The assessee should be willing to pay the amount stipulated under Section 31 of the Act. Hence it has to be held ^{that} ~~resulted~~ dehorse Section 31, an assessee cannot compound an offence as well. The Officer exercising the power under Section 31 can invoke the power only to the extent of imposition of Rs.1000/- as compound fee. By using the expression "not exceeding" in Section 31, it restricts the discretion of the

authority

authority in the matter of imposition of the composition fee. Any stipulation of a higher amount would be, therefore, ultra vires exercise of discretionary power vested in the respondent under Section 31 of the Act. If so, the levy of composition fee of Rs.25,000/- in this case, is clearly an ultra vires act of the respondent which hence can be described as exercise of the statutory power conferred under Section 31 of the Entry Tax Act arbitrarily. When the statute mandates that the State may collect a stipulated amount under a particular head, any collection in excess thereof is clearly without the authority of law and would be clearly illegal. If the said claim is resisted the State, in such a case, would be pleading an illegality committed by it to justify the illegal levy. The receipt of the amount is not in furtherance of any contract but in exercise of its statutory function. In such situation, the State should be pinned down to the four corners of the letters of law.



10. Learned counsel for the petitioner relied on the decision of ~~this Court~~ in ASSISTANT COMMERCIAL TAX OFFICER vs N.N. JARIWALA reported in ILR 1991 Kar. 4414 to sustain his contention. The following passage therein makes the position clear.

"6. The next question for consideration is, whether the respondent was estopped from presenting the Writ Petition on the ground of acquiescence. If the amount of compounding fee demanded and accepted by the respondent was within the maximum prescribed under Section 31 of the Act, there would have been considerable force in the contention of the appellant that the dealer concerned having agreed for compounding of the offences on payment of the amount within the maximum limit prescribed by law and having avoided prosecution, cannot subsequently turn round and challenge that the compounding fee collected was excessive. But in our opinion that consideration will not apply to a case where either on account of misconstruction of the provisions of the Act or for any other reason the competent authority had demanded an amount which is beyond the maximum prescribed by the Act and on account of ignorance or for any



any other reason the dealer concerned had agreed to pay and/or paid the said amount to avoid prosecution. In such a case the dealer concerned would have the right to contend that the amount demanded was not authorised by law and therefore just because the dealer had accepted to pay the amount and have the offence compounded, he cannot be precluded from challenging the action of the authorities on the ground that the collection of compounding fee beyond the maximum prescribed under the Act was illegal. That is exactly the position in this case, in that the maximum amount that could have been collected as compounding fee was Rs.1,000/- and as double that amount has been collected, the respondent had the right to challenge the legality of the levy."

With great respect, it has to be held that the above said principle will apply to the facts of the instant case as well. Therefore, I am of the view, that as the decision relied on by the learned Government Pleader in W.P.No.29546/96 was mainly decided on the conduct of the petitioner in moving this Court belatedly, that principles therein will not apply to the facts of this case. As

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As such following the said decision I allow this Writ Petition. The excess amount of Rs.24,000/- collected from the petitioner as composition fee will be refunded to the petitioner within six weeks from to-day. The Writ Petition is disposed of with the said direction. There will be no order as to costs.



Sd/-
JUDGE

Vb/-